STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN DERENDA HIBBLER,

Defendant-Appellant.

UNPUBLISHED
October 3, 1997

No. 191451
Berrien Circuit Court
LC No. 95-001306 FC

Before: O'Connell, P.J., and MacKenzie and Gage, JJ.

PER CURIAM.

Defendant was convicted by jury of first-degree (felony) murder, MCL 750.316(1)(b); MSA 28.548(1)(b), assault with intent to rob while armed, MCL 750.89; MSA 28.284, conspiracy to commit armed robbery, MCL 750.157a; MSA 28.354(1), armed robbery, MCL 750.529; MSA 28.797, and three counts of possession of a firearm during the commission of a felony. MCL 750.227b; MSA 28.424(2). He was sentenced to a term of life imprisonment with respect to the murder conviction and received various lesser sentences with respect to the remaining convictions. He now appeals as of right, and we affirm.

Defendant first argues that his confession was involuntary and in violation of his Sixth Amendment right to counsel. In reviewing the voluntariness of a confession, this Court examines the entire record and makes an independent determination regarding voluntariness. *People v Marshall*, 204 Mich App 584, 587; 517 NW2d 554 (1994). Nonetheless, we defer to the trial court's superior ability to view the evidence and the witnesses and will not disturb the court's findings unless they are clearly erroneous. *Id.* A finding is clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made. *People v DeLisle*, 183 Mich App 713, 719; 455 NW2d 401 (1990). Defendant maintains that his confession was induced by a promise from the interrogating officer that if defendant would tell the officer what he wanted to hear, he would speak to the judge and not be sentenced to life imprisonment. However, defendant's account of the circumstances surrounding his confession was contradicted by every officer who testified at the suppression hearing. Given the circuit court's superior ability to observe the witnesses and evaluate their demeanor and credibility, we will not disturb the court's decision to rely on the testimony of the officers rather on that of defendant in

the absence of clear error. *Marshall, supra*. We find none. Accordingly, we conclude that no inducements were given to defendant, and, consequently, that his confession was voluntary in light of the totality of the circumstances. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).

Similarly, with respect to defendant's claim that his confession was obtained in violation of his Sixth Amendment right to an attorney, we defer to the trial court's ability to judge the credibility of witnesses and defer to the trial court's acceptance of the interrogating officer's testimony that defendant did not request an attorney. *Heffron, supra*, 547.

Defendant next argues that the trial court erred by including aiding and abetting language in the first-degree felony murder instruction because this language was in addition to a separate aiding and abetting language. This Court reviews jury instructions in their entirety to determine if there is error requiring reversal. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). The instructions must include all elements of the charged offense and must not exclude material issues, defenses, and theories, if there is evidence to support them. *Id.* Even if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.* In the case at hand, the instructions as given include all elements of the charged offenses, and did not exclude material issues, defenses, and theories. No rule exists that prohibits a trial court from including repetitive language within a jury instruction. Thus, the instructions fairly presented the issues to be tried and sufficiently protected defendant's rights.

Defendant also argues that the jury was selected from an array drawn by procedures that systematically excluded African-Americans from the jury venire. Questions of systematic exclusion of minorities from venires are reviewed de novo by this Court. *People v Hubbard (After Remand)*, 217 Mich App 459, 472; 552 NW2d 593 (1996). Defendant is entitled to a jury drawn from a fair cross section of the community, but is not entitled to a jury that mirrors the community and reflects the various distinctive groups in the population. *Id.* To establish a prima facie violation of the fair-cross-section requirement, defendant must show:

> "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." *Id.*, 473, quoting *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).

Here, defendant has satisfied the first prong because "African-Americans are considered a constitutionally cognizable group for Sixth Amendment fair-cross-section purposes." *Id.* However, defendant failed to satisfy the second prong because he has not demonstrated that the number of African-Americans in the jury array is not fair and reasonable in relation to the number of members in the relevant community. *Id.* The 1990 Census of Population indicates that Berrien County has a 15.4% black population. The jury array at defendant's trial consisted of forty-nine potential jurors, of whom five were African-American; thus, 10% of the array was black. An additional potential black juror arrived late, but was told to depart because the jurors had already been administered the first oath; thus,

if one includes this sixth person, 12% of the array was black. Given the minor disparity between blacks of voting age eligible for jury service and the jury array in defendant's trial, defendant has failed to satisfy the second prong of the *Duren* test.

Additionally, defendant has failed to satisfy the third prong of the *Duren* test because he did not demonstrate that the underrepresentation of blacks in the jury array is due to systematic exclusion. *Hubbard, supra,* 217 Mich App 481. "To constitute 'systematic exclusion,' underrepresentation of the distinctive group would have to be 'inherent' to the process utilized," – i.e., "'existing in something as a natural, inseparable quality or characteristic.'" *People v Guy*, 121 Mich App 592, 600; 329 NW2d 435 (1982). In this instance, the jury array is randomly selected from a list of persons who are eighteen years of age or older, from Berrien County, and who possess either a Michigan personal identification card or drivers license. The list is provided to Berrien County from the State of Michigan, in accordance with MCL 600.1300; MSA 27A.1300; MCL 600.1301a; MSA 27A.1301(1), MCL 600.1304; MSA 27A.1304. Potential jurors are randomly selected by computer from this list, and jury questionnaires are sent to those individuals. The race of potential jurors is not known or considered at any stage in the jury selection process. Defendant argues that systematic exclusion is present because Berrien County does not follow up on the unreturned questionnaires, and that black persons are more likely not to return a jury questionnaire. Defendant relies heavily on the statutory provisions that address the power of the jury board and the courts in dealing with jury selection. Despite the County's failure to follow up on questionnaires, defendant has presented nothing to show that African-Americans are more likely not to return jury questionnaires. Moreover, because race is not known or considered at any stage in the jury selection process, it is unlikely that defendant would be able to prove such a proposition.

Affirmed.

/s/ Peter D. O'Connell
/s/ Barbara B. MacKenzie
/s/ Hilda R. Gage